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March 13, 2002

VIA HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Notification
CG Docket No. 02-278 and CC Docket No. 92-90
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

Dear Ms. Dortch:

On March 12, 2003, Robert McNamara, Frank Triveri and Patsy McSweeney of Nextel Communications, Inc. ("Nextel") and the undersigned. counsel for Nextel, met with Bureau Chief Dane Snowden, Deputy Bureau Chief Margaret Egler, Acting Division Chief Richard Smith and attorney Erica McMahon of the Consumer and Governmental Affairs Bureau. At this meeting, we discussed the arguments set forth in Cox's Comments and Reply Comments in the above-referenced proceeding. In response to the staffs request, we also are submitting the attached litigation brief for the Commission's review in this proceeding.

Pursuant to Section 1.1206(b) of the Commission's rules, an original and one copy of this letter and enclosure are being submitted to the Secretary's office for the above-captioned docket, and a copy is being provided to the meeting attendees. Pursuant to the Commission's ***Notice** of Proposed Rulemaking* in this proceeding, four copies also are being provided to Kelli Farmer. Should there be any questions regarding this filing, please contact the undersigned.

Respectfully submitted,

To-Quyen Truong

TTT/
Enclosure
cc: Dane Snowden
Margarer Egler
Richard Smith
Erica McMahon
Kelli Farmer (4 copies)

CASE NO. C200100349

J. GREG COONTZ,	§	**IN THE DISTRICT COURT OF**
PAUL G. RELEW and	§	
BELEW, BROCK & BELEW, L.L.P.,	§	
Individually, and on behalf **of** all	§	
others similarly situated,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**JOHNSON COUNTY, TEXAS**
	§	
NEXTEL COMMUNICATIONS, INC.,	§	
NEXTEL OF TEXAS, INC. and	§	
AMERICAN BLAST FAX, INC.	§	
	§	
Defendants.	§	249th **JUDICIAL DISTRICT**

PLAINTIFFS' RESPONSE IN OPPOSITION **TO**
NEXTEL OF TEXAS, INC'S MOTION FOR SUMMARY JUDGMENT

TO **THE HONORABLE D. WAYNE BRIDEWELL,**
298"' DISTRICT COURT JUDGE:

COMES NOW, Plaintiffs, J. Greg Coontz, Paul G. Belew and Belew, Brock & Belew (collectively "Plaintiffs"). and files this response in opposition to the summary judgment motion of Nextel of Texas, Inc. (Nextel Communications, Inc. did not seek summary judgment) and in support thereof would respectfully show this Honorable Court as follows:

I. INTRODUCTION:

In the last year three *(3)* out of three *(3)* Tarrant County District Judges have granted summary judgments in favor of proposed class representatives against four **(4)** different customers of American Blast Fax, Inc. ("ABF"), precisely like, for reasons discussed below, Nextel of Texas. Inc. (hereafter "Nextel"). Likewise, all four (4) of those ABF customers sought

sumtnaryjudgmcnts and all four **(4)** were denied. More recently, the Dallas Cowboys sought the same summary judgment in the undersigned's proposed class action against them in Tarrant County that they prevailed on in Dallas. That Cowboys' "no use" and so-called "independent contractor defense" MSJ was denied. Since August of 2000, the undersigned's clients have prevailed on six (6) out *of* seven (7) summary judgment proceedings on TCPA liability rulings.

Chronologically, the Honorable Bob McCoy denied **ABF** customer, Landmark Mortgage's, motion for summary judgment and entered **a** summary judgment end a separate injunction against ABF. Those rulings are attached to Plaintiffs' simultaneously filed Binder of Exhibits as Exhibits "A" and "B."[1] Next, the Honorable Jeff Walker entered summary judgment in favor *of* a class representative and denied three different class defendants' (ABF customer) motions lor summary judgment. Those orders are collectively attached as Exhibit "D". Third, the Honorable Paul Enlow, again, granted another class representative's motion for summary judgment against ABF customer Landmark Mortgage. Exhibit "E'.

Fourth, the Dallas Cowboys sought a summary judgment on grounds including a) the lack of their "use" of a fax machine; b) the so-called independent contractor defense; and c) the TCPA is unconstitutional because it lacks a scienter requirement. That Cowboys summary judgment motion was denied. Exhibit "H".

The Honorable David Gibson, after copious briefing and oral argument, denied a TCPA delendants' sumrnary judgment based on the grounds that the TCPA does not govern intrastate

[1] **All** exhibits attached hereto which letter from "A" through "DD", inclusive, are true **and** correct copies of the original, are attached and incorporated **by** this reference as responsive summary judgment evidence the same as **if** set forth at length herein verbatim.

fax advertising. Exhibir "I" Next, after expressly considering motions, responses. briefs, authorities filed by both sides, arguments and post-argument letter briefs, the Honorable Vince Sprinkle concurred with Judge Womack when he ruled that:

> Defendants' Morion for Summary Judgment which asserts the we "did not 'use' any telephone fax machine" to send an unsolicited fax defense and the so-called independent contractor defense, in response to Plaintiffs' Telephone Consumer Protection Act claims, is in all things DENIED.

Exhibit "J". Judge Sprinkle, therefoi-e, denied summaryjudgment relief to the sixth (6th) out of six (6) ABF customers who sought such relief.

Nextel advocates that this Court should give weight to a single Dallas summary judgment ruling which the undersigned counsel had nothing to do with. Also Nextel chose not to disclose to this Court that the Plaintiffs in that case never raised the statute which trumps the entirety of Nextel's summary judgment motion before this Court; 47 U.S.C. § 217. The entirety of that Dallas response. which omits this statute, which Nextel did not attach, is attached (out of order) as Exhibit "V"

II. LIMITED BASES OF NEXTEL'S SUMMARY JUDGMENT

Nextel's motion is based on grounds far more limited than any of rhe six of seven defeated motions for summary judgment referenced above. Nextel's motion is limited to two grounds: a) Nextel authorized dealers are not Nextel's agents; and b) the fax ads sent by Nextel authorized dealers bearing the name of Nextel, in the name of Nextel to sell Nextel products and make Nextel money, exceeded the limitations on the dealers' authority. Id. at 2 & 12.[2]

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[2] "Motions tor summary judgment 'stand or fall on the **grounds *specifically*** set forth in the motion(s)."' *Uribe v. Houston Gen. Ins. Co.*, 849 S.W.2d 447, 448 (Tex.App. - San Antonio 1993. no writ)(emphasis in original), accord. *Chessher v. Southwestern Bell Telephone Co.*, 658 S.W.2d 563. **564 (*Tex.* 1983)**(the movant must establish his entitlement to a summary judgment on the "issues ***expressly*** *presented* to the trial court by conclusively proving

III. WHY NEXTEL'S MOTION FAILS

Movant, Nextel of Texas, lnc. has admitted in response to requests for admission that it is regulated by the Federal Communications Commission (the "FCC") as a "common camer". See, Ex. W, Nextel of Texas, Inc.'s Responses to Plaintiffs' Second Set of Requests for Admission, RFA's 2-4 & 9-10. For the past 68 years common camers have been statutory liable for violations of Chapter 5 of the 1934 Telecommunications Act when someone is "acting for" them the same as if they were acting for themselves. 47 U.S.C. § 217. The I l year old 1991 Telephone Consumer Protection Act, 47 U.S.C. §227,§§ et seq., ("TCPA"), is part of Chapter 5 of the 1934 Telecommunications Act.

Asacommon camer, Nextel has since the day it became Nextel Communications (f/k/a Fleet Call, Inc.) been subject to comprehensive oversight and regulation by the FCC. In fact, Nextel's most significant venture, digital phones, was the product of a 1991 FCC authorization. 9 FCCR 1411, In the Matter of Implementation of [various sections of the 19341 Communications Act. Regulatory Treatment of Mobile Services (1994), ¶ 7. Pertinent portions of that FCC order are attached as Exhibit "X".

Nextel was not only actively involved with this FCC adjudication by filing both a "Comment" and a "Reply Comment" [Ex.X, Appendix D]. Nextel was one of the commercial radio service providers subject to this order. This FCC ruling, therefore, not only placed Nextel on notice that it "must comply" with numerous sections of Chapter 5 of the 1934 Telecommunications Act, including the TCPA (47 U.S.C. $227) as well as the 68 year old law making common carriers liable

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all essential elements in his cause of action or defense as a matter of law.")(emphasis in original),

lor violations of thereof by "person[s] acting for" them. 47 U.S.C. §217. Sec, Ex. X, § 20.17(a).

Over four **(4)** years after Nextel was ordered to comply with the TCPA, in August of 1999, Nextel not only knew about the TCPA, they knew that Nextel would be liable if Nextel direct or indirect dealers (like Can Am) were sending out Nextel fax ads. Consequently, Nextel in-house counsel drafted an "Inter-Office Memorandum" containing warnings about TCPA compliance directed to their Regional Marketing VP's who were directed to provide this memorandum to the Nextel "indirect and direct dealers". See. Exhibit Y

This memo from the "Nextel Legal Department" and provided to numerous in-house attorneys prior to its dissemination [see, Nextel's privilege log] accurately states the law as quoted below:

> Because ***Nextel AND ITS DEALERS are subject to the TCPA***
>
> . . .
>
> While there are a number of ***specific prohibitions in the TCPA thaf all "persons", INCLUDING NEXTEL, are subject to.*** the following are the main prohibitions that affect Nextel, its direct ***AND INDIRECT DEALERS:***
> **Unsolicited Facsimiles:** No person may use a telephone facsimile machine ... to send an unsolicited advertisement to a telephone facsimile machine.
>
> In light of the FCC's recent indication that it intends to enforce its existing guidelines, it *is especially important that local* ***Nextel*** *personnel* ***AND DEALERS*** follow these guidelines.

Exhibit Y, ¶¶ 2-4 (em. added)

Nextel has sworn that this "TCPA Memorandum was distributed to all of its Texas Nextel independent distributors at that rime [August 1999]". See Exhibit DD, p. 6, Int. No. 1. However, 47 U.S.C. § 217, makes Nextel liable even without these admissions,

Since 1934, Section 217 has provided:

In construing and enforcing the provisions of this chapter [of which the TCPA is a

> part], the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case by also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.

Both the TCPA (Section 227) and this 67 year old law expanding common carrier liability for the acts of others (Section 227) and this 67 year old law expanding common carrier liability for the acts of others (Section 217) are contained in Chapter 5, Subchapter II, Part I "Common Carrier Regulation'' of the 1934 Telecommunications Act. The table of contents for the entirety of Chapter 5 is attached as Exhibit "2" to Plaintiffs' Third Amended Class Action Petition, which is incorporated by this reference.

Ofcoui-se, the plain text of this statute holds Nextel liable for the acts of its dealers who are undebatably "acting for" Nextel when they send out fax ads bearing the name *of* Nextel, let alone when a portion of the profits will be made by Nextel and they never take action to disgorge the ill-gotten gains. However, beyond the simple and plain text of this statute, that Nextel has been specifically ordered by the FCC **to** comply with, the FCC has also ruled that a common camer is liable in a substantively identical circumstance

> Nextel's summary judgment motion states:
>
> [a]ssuming, however, that Plaintiffs are correct that the fax at issue does constitute such a violation, CAN-AM's conduct in violating those statutes [sic] plainly exceeds the bounds of these express limitations placed on CAN-AM's authority.

Nextel MSJ at 10. This is the identical argument made by another common camer to the FCC just last year. The common carrier

> argue[d] that it relied solely upon independent contractors to market its services, and that it cannot be held liable for their misconduct. Section 217 of the [1934 Telecoinmunications] Act, however, expressly imposes liability on camers for the acts of their independent contractors. [quote from 47 U.S.C. § 217 ommitted]

In the Matter of AT&T Corp. v. Winback & Conserve, FCC Memorandum Opin. and Order, FCC 01-234, 2001 WL 95 1018, ¶ 21 & n. 56. See, Exhibit BB.

In making another identical ruling against another carrier for more violations of Chapter 5 of the 1934 Telecommunications Act, the FCC stated:

> [t]he [Federal Communications] Commission has ruled on numerous occasions that camers are responsible for the conduct of third parties acting on the carrier's behalf, including third party marketers.

In the Matter of Long Distance Direct, Inc., FCC Memorandum Opin. and Order, FCC 00-46, 2000 WL 177864, ¶ 9 & n. 9 (common carrier "asserts that the acts at issue [slamming and cramming] were those of an independent contractor", points out that it "ended the relationship with" such independent contractor – FCC fines common carrier $2,000,000.00 for its first offense). See, Exhibit AA, ¶¶ 20-22. The FCC also made the following ruling in this opinion:

> LDDI [the common camer like Nextel] is *not* relieved of liability merely because it directed [the independent contractor to follow the] law. Section 217 of the [1934 Telecommunications] Act deems "the act, omission or failure of any... person acting for or employed by" any carrier to be the act, omission or failure of that carrier. This language is extremely broad and clearly extends to [the independent contractor] which was "acting for" [the common carrier in slamming long distance accounts].
>
> . . .
>
> To hold that the section [217] does not include independent contractors would create a gaping loophole in the requirements of the Act and frustrate legislative intent.

FCC Memorandum Opin. and Order, Ex. AA, ,¶ 9.

Before addressing the controlling authority on the fact that these FCC holdings must be accorded either "controlling weight" or at a minimum substantial deference, while not addressed in Nextel's motion, Plaintiffs' respectfully provide this Court an overview of the TCPA and why the conduct of Nextel's dealers violates same

IV. CONTROLLING TCPA AUTHORITY

A. The TCPA

The TCPA makes it:

> unlawful for any person within the United States…to use any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine.

47 **U.S.C.**§ 227(b) & (b)(1)(C). (Exhibit "K")

B. Advertisers who contract to send fax ads, use fax machines to send fax ads.

The TCPA does not simply read "it shall be unlawful for any person to send..." Rather, the TCPA completely bans all unsolicited fax ads by prohibiting the ''use''of any telephone facsimile machine…to send". 47 U.S.C. § 227(b)(1)(C).[3] Thus, in order for the word "use" to have an operative effect, the statute must mean that "using" a fax machine to "send' is broader than pressing the send button

It is, of course, a "settled rule that a statute must, if possible, be construed in such fashion that every word has operative effect." *Landgraf v. USI Film Products*, 511 U.S. 244,295 (1994), accord, ***Beck*** v. *Prupis*, S29 U.S. 494, 506 (2000)("longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous."), accord, *Abrams v. **Jones,*** 25 S.W.3d, 620,625 (Tex. 2000).

"When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States,* 508 U.S. 223, 228 (1993). Most recently, the U.S. Supreme Court defined the word "use" to include the trading of firearms for drugs as a

[3] "It shall **be** unlawful for any person…to ***use*** any telephone fax machine…to ***send*** an unsolicited fax advertisement to a telephone facsimile machine." (em. added)

"use" of a firearm during a drug trafficking operation. *Id.* In *Smith,* the U.S. Supreme Court quoted two definitions of the word "use" from Websters, both of which were included in the six definitions of the word it quoted from Blacks Law Dictionary. *Id.* at 229

Because the word "use" is not defined in the TCPA, the *Smith* Court instructs that it should be construed in accordance with its "ordinary and natural meaning" which the Supreme Court found to include the following six definitions:

1. to make use of;
2. to convert to one's service;
3. toemploy;
4. to avail oneself;
5. to utilize; and
6. to carry out a purpose or action by means of

502 U.S. 228-229. The Texas Supreme Court has defined the word "use" to mean:

- to put or bring into action or service; and
- to employ for or apply to a given purpose.'

It is beyond legitimate debate, that Nextel's dealers used fax machines to send unsolicited fax ads under all eight of these ordinary meanings of the word. They:

made use of the fax machine to sell phones and phone contracts;

convened the fax machine to their service, as it was Nextel, not **ABF,** being advertised;

employed the fax machine, as it was being used for them not anyone else;

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[4] *Mt. Pleasant Inde. School Dist. v. Estate of Lindburgh*, 756 S.W.2d 208, 211 (Tex. 1989), accord, *Vela v. City of McAllen*, 894 S.W.2d 836, 840 (Tex. App. - Corpus Christi 1985, no writ)(identical ordinary definitions of the word "use" as the Texas Supreme Court), *Beggs v. Texas Dep't of Mental* Health, 496 S.W.2d 252, 254 (Tex.Civ. App. - San Antonio 1973, writ ref'd)(ditto). However. as demonstrated below, federal law determines the rights and defenses under the federal TCPA. nonetheless. in the eventhis Honorable Court deems it necessary or appropriate to look to the law other than that of the U. S. Supreme Court on the construction of the TCPA. these Texas cases are cited.

availed themselves of the fax machine, as they were the one getting the benefit of it and they contracted for the use of it;

they utilized the fax machine by contracting for the use of it;

they carried out a purpose or action by means of advertising their housing availability through sending faxes from the machine;

they put and brought the fax machine into action and service, by signing at least 73 fax ad contracts and controlling the content of every fax ad that was sent pursuant to same and approving such ads for dissemination; and

they employed for and applied the fax machine to a given purpose, by all of the above.'

Such ordinary meanings of the word "use" are extremely well-established. In *Smith*, the U.S. Supreme Court pointed out the word "use" was similarly constructed "over 100 years ago" as both "to employ" or "derive service from". *Id.*, citing, *Astor v. Merritt*, 111 U.S. 202. 213 (1884). Of course, Nextel's dealers both employed and derived a service from the sending of the faxes in question, in fact, they created one of the first fax ads, they controlled the content of numerous fax ads, contracted for it, determined where it would be sent, paid for it and yet still maintained the right to control the ceasing of dissemination.[6]

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[5] It is nor disputed that one hundred percent (100%) of the pertinent summary judgment evidence supports the fact Nextel's dealers *"used"* a **fax** machine to send unsolicited fax ads under EVERY SINGLE ordinary and natural definition of that word. For example: the 73 contracts that Nextel's dealers entered whereby they contracted for the use of fax machines "for the express purpose **of** Fax Advertising" and agreed to pay **for** the sending of over 2.2 million faxes "to active fax reception devices.

[6] The testimony of ABF's lead salesman, Larry Krouse, is unmistakeable; all ABF clients. not ABF, controlled and approved the content of 100%of the fax ads sent on their behalves. Krouse Depo. Ex. T at 34:10-18, 33:15-23.

It is of course, also the natural and ordinary meaning of the word "send" to interpret the person who sends as the originator of the fax or the controller of its content.' Simple English mandates this interpretation. If asked; who sent the letter? The answer will inevitably be, the person who signed it; not the USPO, not Fed Ex and not the secretary who pressed the send button on the fax machine, they were merely used by the content controller to send the letter. Simple English is not overcome by the "technology" of a fax machine. If you ask someone, who sent you the fax (or even the e-mail) 99% of the time, the answer you get will be the content controller, not the person in the mail room at the law firm who presses the send button and not AOL in the case of an e-mail.

In fact, all eight (8) of the applicable definitions of the word "send" as contained in Webster's (which the Supreme Court directs us to for undefined terms) encompass Nextel's conduct: 1) to cause to go; 2) to cause to happen; 3) to dispatch by a means of communication; 4) to direct, order, or request to go; 5) to force to go; **6)** to cause to issue; 7) to cause to be carried to a destination; and 8) to convey or cause to be conveyed or transmitted by an agent. *Webster's Collegiate Dictionary* (9th ed. 1989).

Any construction other than in accordance with these natural and ordinary meanings of the word "use" and the word "send' would make the U. S. Congress' complete ban on unsolicited fax advertising, no ban on such advertising whatsoever. Not holding advertisers liable would eviscerate and do away with the natural and ordinary meanings of the words "use"

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[7] **For** purposes of complying with **"fax** header" identification requirements, the FCC agrees and has **so** ruled; "the sender of a fa[x] message is the creator of the content of the message." FCC Memorandum Opinion and Order. 12 F.C.C.R. 4609, 1997 WL 177258 ¶6 **(April** 10, 1997) (Exhibit "N", p. 4).

and "send" and make it solely "unlawful for any person to press the send button..."[8] If the TCPA was so amended to appease Nextel, Congress would have passed a complete ban on unsolicited fax advertising in vain. All advertisers would have to do is hire someone to press the send button and the TCPA would prohibit zero fax advertising.

C. 100% of the pertinent legislative history supports the indisputable fact that it was Congress' intent to hold advertisers, not fax transmitters. liable and responsible for TCPA compliance.

A House Report on a pre-cursor 'TCPA bill refemng to a section *of* that bill which contained a complete ban on unsolicited fax ads stated:

> ***[t]he [House] Committee intends that the requirements of the section be imposed on the advertiser*** and not the caniers who transmit the advertisements...

H.R. Rep. 101-633, 102"'Cong., 1st Sess. 1990, 1990 WL 259268 (em. added). (Exhibit "O", p. 9) The same report states:

> [f]a[x] machines are designed to accept, process and print all messages ... The ***fax advertisers*** takes advantage of this basic design by sending advertisements ... When an advertiser sends [junk mail] the recipient pays nothing... In the case of fax ad[s], however, the recipient assumes both the cost of ... (em. added)

Id. **(Ex. O,** p. 4)

In a House Report on a pre-cursor TCPA bill (which included an EBR defense for fax advertising) under the heading "Background and Need for the Legislation" it stated:

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[8] As the Supreme Court instructs: "[t]he plain meaning of legislation should be conclusive, except in 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' [citation omitted] In such cases, the intention of the drafters, rather than the strict language controls." *U.S. v Ron Pair Enterprises, Inc., 489* U.S. 235, 242 (1989). If this Honorable Court believes that "use" and "send" must both be constructed so narrowly that they do not encompass their ordinary and natural meanings, such result would he "demonstrably at odds with the intentions of its drafters". Consequently, we are then instructed to look to the "intention of the drafters. rather than the strict language". As demonstrated below, the intent of Congress was NOT to hold mere transmitters liable, but to hold advertisers liable.

> *[a]dvertisers* have also seized on fa[x] machines, often coupled with personal computers; as another potent tool for direct marketing ... ***An advertiser's fa[x] machine*** can easily deliver tens of thousands of unsolicited messages per week to other fa[x] machincs across the country. (em. added)

H.R. Rep. 102-317, 102nd Cong., 1st Sess. 1991, 1991 WL 245201 * 6. (Exhibit "P", p. 9)

Under the heading "Summary of Major Provisions" a Senate Report on a pre-cursor TCPA bill (which did not include an EBR defense lor **fax** advertising) stated:

> Junk Fax: ban ***all*** unsolicited fax ***advertisements*** sent by fax machine ..

S. Rep. 102-178, 102nd Cong., I" Sess. 1991, 1991 WL 211220 * ***6*** (em. added) (Exhibit "Q", p. 7) The same Senate Report reads:

> Also, ***the reported bill prohibits telemarketersfrom sending unsolicited ad[s] via a far machine.*** ... In other words, as long as the recipient of a fax either invites or g[r]ants permission, ***telemarketers will be responsible for determining whether a potential recipient of an advertisement, in fact, has invited or given permission to receive such fax messages,*** such a responsibility, is the minimum necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner's use of his or her fax machine. (em. added)

Exhibit "Q". p. 8.

> Just two pages later the same Senate Report in relation to the same unsolicited fax ban says:
>
> [t]he regulations .. do not apply to the common carrier or other entity that transmits the call or message **[ABF]** and that is ***not*** the originator or controller of the content of the call or message [Nextel].

Id. at 10 (em. added).

As demonstrated from these Congressional reports, Congress knew the difference between an advertiser that uses a fax machine through a transmitter like **ABF** -- and transmitters who do not control content. Congress made such advertisers, who were not pressing the send button, the target of compliance, enforcement and liability. On the other hand, it was Congress'

unwavering intent lo insulate transmitters (button pushers) from liability and compliance.

As demonstrated, Congress understood and worked from the obvious proposition that a 50 stare ban on unsolicited fax ADVERTISING had to be imposed against and hold ADVERTISERS accountable.

D. The TCPA's explicit regulatory mandate to the FCC.

The TCPA explicitly requires the Federal Communications Commission ("FCC") to prescribe regulations to implement the requirements of its complete ban on the use of facsimile machines to send unsolicited fax ads. 47 U.S.C. § 227(b)(2). The TCPA states:

> The [Federal Communications] Commission ***shall*** prescribe regulations to implement the requirements of this ***subsection.***

47 U.S.C. § 227(b)(2)(em. added)

Congress, of course, knew the difference between a section and a subsection. This distinction demonstrates that Congress' mandated FCC regulations to enforce the ban on unsolicited fax advertising but did not provide the FCC authority to change the definition of an unsolicited fax advertisement (eg. engraft an EBR defense for fax advertising).

In pertinent pan, the definitions set forth in subsection (a) *of* the TCPA apply to "this section" or, all *of* the TCPA, which is set forth in Section 227. However, the FCC's authority is limited to "prescrib[ing] regulations to implement the requirements of this subsection" which is contained in subsection (b) *of* Section 227. See, the TCPA, Ex. H.

The definition of an "unsolicited [fax] advertisement" is contained in subsection (a) (hence, the FCC did not have explicit authority to interpret that definition or enlarge it with an "EBR defense", while the complete ban on unsolicited fax advertising is contained in subsection

(b) which the FCC was explicitly required to prescribe regulations to implement that ban. 47 U.S.C. § 227(b)(2), (a)(4) & (b)(1)(c).

Subsection (b), in its entirety, contains four "[p]rohibitions" set forth in (b)(1)(A) - (D). The third prohibition is the complere ban on unsolicited fax ads. The FCC was, therefore, explicitly mandated to prescribe regulations to implement subsection (b)(1)(C)

E. Can an advertiser claim it did not "use" a fax machine to "send" when they hire someone to do it for them?

Can an advertiser evade liability under the TCPA by not pressing the send button or by not "physically" using the fax machine to send the faxes? Judge Walker answered these questions in the negative; in a class action, four **(4)** times, Judges Enlow, Womack and Sprinkle have answered these questions in the negative another three (3) times.

The FCC acting pursuant to its congressionally mandatedrequirements under the TCPA has also answered these questions in the negative; twice. In a publicly disseminated document the FCC first answered this question with a clear and resounding **"NO'** in 1993 and then did it again in 1995. In 1993,the FCC published an Industry Bulletin, where the following question andanswer are found:

> WHO IS RESPONSIBLE FOR COMPLIANCE WITH FCC RULES ON TELEPHONE FACSIMILE TRANSMISSION?
>
> **The person on whose behalf a facsimile transmission is sent will ultimately be held liable for violations of the TCPA or the FCC rules.**

Telephone Consumer Protection Act: Telephone Solicitations, AutoDialed and Artificial or Prerecorded Voice Message Telephone Calls, and the Use of Facsimile Machines, 8 F.C.C.R 506 (January 11, 1993)(em. in original). This FCC publication is attached as Exhibit "L", see, p. 5.

Acting, therefore, for a second time on their explicit and mandatory TCPA created obligation to prescribe regulations to effectuate the complete ban on unsolicited fax ads, in 1995 the FCC specifically ruled:

> ***The entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements*** and that fax broadcasters [like ABF] are not liable for compliance with this rule. This interpretation is consistent with the TCPA's legislative history, and with our finding in the [1992] Report and Order that [common] carriers [like AT&T] will nor be held liable for the transmission of a prohibited message.

FCC Memorandum Opinion and Order, 10 F.C.C.R. 12391, 12407,835 (July 26, 1995)(em.added). This FCC Opinion and Order is attached as Exhibit "M", see, p. 12.

The summary judgment evidence is uncontradicted that the fax ads in question were sent on behalf of Ncxtel and Nextel does not contend otherwise. See. Exhibits **S** & U. In other words, the TCPA says Nextel is liable, 100% of the pertinent legislative history establishes unwavering congressional intent to hold the fax ADVERTISER liable and the FCC, who was MANDATED by Congress to enforce its unsolicited fax ad ban has ruled that the ADVERTISER is liable.

III. IF THIS HONORABLE COURT CONCLUDES THE TCPA AND/OR 47 U.S.C. § 217 IS SILENT OR AMBIGUOUS ON ADVERTISER OR COMMON CARRIER LIABILITY FOR VIOLATIONS OF CHAPTER 5 OF THE 1934 TELECOMMUNICATIONS ACT, THEN THE FCC CONSTRUCTION OF THE STATUTE MUST BE GIVEN "CONTROLLING WEIGHT"

A. What determines the test **for** iudicial reversal **of** an administrative interpretation?

As recognized by the Texas Supreme Court in 2001, in 1984 the U.S. "Supreme Court established the questions to consider in dctcrmining the weight a court should give an agency's construction of the statute it administers"[9]:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter: for the court, as well as the agency, must give clfect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue. the court does not simply impose its own construction on the statute, as would bc necessary in the absence of an administrative interpretation. *Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible consrruction of the statute.* (em. added).

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)

If this Honorable Court concludes that the TCPA is not clear that advertisers are liable for using lax machines or sending fax ads (because they avoid pressing the send button or target selection) or that 47 U.S.C. § 217 is not clear on common carrier liability for violations of Chapter 5 of the 1934 Telecommunications Act, it would appear that "the question forth[is] Court is whether the agency's answer is based on a permissible construction of the [TCPA]." Significantly, in 2000, in a case important to Dallas and Forth Worth the precise question was at issue; the appropriate amount of deference to be afforded to an agency interpretation of a federal statute [the Department

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[9] *In re American Home Star of Lancaster, Inc.*, 50 S W 3d 480, 490 (Tex. **2001)**

of Transportation interpretation of the Federal Airline Deregulation Act]. *Legend Airlines. Inc. v. City of Fort Worth*, 23 S.W.3d 83, 95 (Tex.App. - Fort Worth 2000, pet. denied). The *Legend* Court held: "[u]nder the clear mandate of the United States Supreme Court [in *Chevron]*, we must give 'controlling weight' to reasonable DOT interpretations of the **ADA."** *Id.*

Significantly, the *Legend* Court held that even if they disagreed with the agency interpretation it had no authority to change it. *Legend* held:

> [f]inally, even if we were inclined to agree with appellees' position, we are not empowered to substitute our judgment for that of the DOT in this case. *Under rhe clear mandate of the United States Supreme Court [citing Chevron], we must give "controlling weight" to reasonable DOT interpretations of rhe ADA.*

Legend v. City of Fort Worth, 23 S.W.3d at 95 & n. 58 (em. added). The *Legend* Court cited to page 844 of *Chevron* for the "controlling weight" standard. *Id.* at 95, n. 58

That *Chevron* "controlling weight" standard derives, on that page, from whether the agency interpretation at issue is one which stems from an explicit legislative delegation of authority or an implicit one. The latter results in the lesser standard of preventing judicial reversal of "reasonable interpretations" made by the agency charged with regulation. *Chevron* held:

> [i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. *Such legislative regulations are given controlling weight unless they are arbitrary, capricious. or manifestly conrrary Io the statute.* Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of any agency. (em. added)

467 U.S. at 843-44 & n. 12. This is unquestioned controlling Supreme Court case law. *United Stares v. Morton*, 467 U.S. *822*, 834 (1984)("[b]ecause Congress explicitly delegated authority to construe the statute by regulation, in this case we must give the regulations legislative and hence

controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute.")(em. added)

Therefore, upon close examination of *Chevron*. the controlling test for potential judicial reversal of the FCC construction of the TCPA holding advertisers liable is that such construction must be provided "controlling weight" because it is not "arbitrary, capricious, or manifestly contrary to the statute". Nonetheless, Plaintiffs' outline of legislative history set forth above and discussed further below leaves no doubt that the FCC's interpretation ''fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design," which the U.S. Supreme Court has twice reaffirmed in the past 6 years is the test lor affording such determination "controlling weight". *U.S. v. Haggar Apparel Company,* 526 U.S. 380,392 (1999) and *Nations Bunk of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995).

B. Is holding advertisers liable arbitrary, capricious, manifestly contrary to or an unreasonable interpretation of the TCPA?

No. As demonstrated above in Section II, **B,** *infra*, the FCC's opinions holding advertisers liable is nothing more than attributing what the U.S. Supreme Court calls the ordinary and natural meaning of the words "use" and "send" to undefined terms in the TCPA." Every one of these definitions demonstrates the reasonableness of the FCC's interpretation and indisputably the lack of its arbitrariness or capriciousness.

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[10] Per the U.S. Supreme Court, the ordinary and natural meaning of the word use **are:** lo **make** use of; to convert to **one's** service; *to* employ; to avail oneself; to utilize; and to carry out a purpose or action by means ***of.*** *Smith v. United States,* 508 U.S. *223.* 228 **(1993).**

In the sentence immediately following the FCC ruling that the entity on whose behalf the facsimiles are transmtited are liable under ihe TCPA, the FCC, stated:

> This interpretation is consistent with the TCPA's legislative history, and with our finding in the [1992] Report and Order that [common] carriers [like AT&T] will not be held liable for the transmission of a prohibited message.

FCC Memorandum Opinion and Order, 10 F.C.C.R. 12391, 12407,¶35 (July 26, 1995)(Ex. M at 12).

The FCC was right; as demonstrated in Section III, C, *infra,* the legislative history is replete and unwavering in establishing that the fax ***advertiser*** was the focus and target of the ban on all unsolicited fax ads. Clearly, the FCC interpretation was in accord with the legislature's "revealed design".

The FCC's construction holding advertisers liable is, therefore, precisely in accordance with a construction of the TCPA which would hold advertisers liable even without the FCC ruling – as advertisers have used a fax machine, availed themselves to a fax machine and converted a fax machine to their purpose to send ads on their behalf – and is in precise accordance with the legislative history of the TCPA which focused neither on common carriers, nor broadcasters, but advertisers.

It is not only indisputable that not holding advertisers – the entities on whose behalf the faxes are sent – ultimately responsible would not ban all unsolicited fax ads, it is reasonable to conclude that not doing so would ban virtually none.

B. Is holding common carriers liable for their independent contractor/dealers violations of the TCPA arbitrary, capricious, manifestly contrary to or an unreasonable interpretation of the 47 U.C.S. § 217?

No. The very first section of Chapter 5 of the 1934 Telecommunications Act is Section 151. That section created the FCC for the express purpose that the FCC "shall execute and enforce the provisions of this chapter [5]". As stated, 47 U.C.S. § 217 is a part of Chapter 5 of the Act. Since 1934, Section 217 has provided:

> In construing and enforcing the provisions of this chapter [of which the TCPA is a part], the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case by also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.

47 U.C.S. § 217. The FCC has held that,

> Section 217 of the [1934 Telecommunications] Act, however, expressly imposes liability on camers for the acts of their independent contractors. [quote from 47 U.S.C. § 217 ommitted]

In the Matter of AT&T Corp. v. Winback & Conserve, FCC Memorandum Opin. and Order, FCC 01-234, 2001 WL 951018, ¶ 21 & n. 56. See, Exhibit BB. In fact,

> [t]he [Federal Communications] Commission has ruled on numerous occasions that camers are responsible for the conduct of third parties acting on the carrier's behalf, including third party marketers.

In the Matter of Long Distance Direct, Inc., FCC Memorandum Opin. and Order, FCC 00-46, 2000 WL 177864, ¶ 9 & n. 9

Consequently, Plaintiffs respectfully contend that the analysis of the propriety of Nextel's motion for summary judgment ends here; it is indisputable that the TCPA explicitly mandates that the FCC prescribe regulations to implement the complete ban on fax ads and to execute and enforce Chapter 5 of the Act; the FCC has done so twice in relation to the TCPA most recently

ruling that the "entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements". The FCC has done so to repeatedly in relation to Section 217 as well, expressly rejecting Nextel's precise contention. The U.S. Supreme Court and the Fort Worth Court of Appeals both hold that such FCC constructions must be afforded "controlling weight" by this Court.

Based on the foregoing, the remainder of this response is devoted to demonstrating that even if this Honorable Court concludes that

a) 47 U.S.C. § 217 is not clear on common carrier liability for the unauthorized acts of independent contractors;

b) 47 U.S.C. § 151's regulatory mandate to the FCC to enforce Chapter 5 of the Act is not explicit;

c) *Chevron* does not require that the FCC opinion be afforded controlling weight;

d) *Legend* docs not require that the FCC opinion be afforded controlling weight; and/or

e) the FCC interpretation common caniers liable for the unauthorized acts of independent contractors; is arbitrary, capricious, manifestly contrary to the statute or unreasonable;

Ncxtel's motion for summary judgment still fail for a number of reasons.

V. ADDITIONAL REASONS WHY NEXTEL'S MOTION FAILS

A. Nextel ratified the fax advertising on its behalf.

Plaintiffs deny that it is necessary to prove that Nextel ratified the fax advertising in its name and on its behalf in light of 47 U.S.C. § 217, the TCPA, the FCC rulings and pronouncements on both and the controlling weight they must be afforded, nonetheless, in the

event this Honorable Court disagrees, Nextel is liable as a result of its ratification. Ratification is the affirmance by a person of a prior act which when performed did not bind him, but which was professedly done on his account, whereby the act is given effect as if originally authorized by him. *McWhorter v. Sheller,* 993 S.W. 2d 781, 787 (Tex. App. - Houston [14th Dist.] 1999), accord, *Land Title Co. v. Stigler,* 609 S.W.2d 754, 756-57 (Tex. 1980)("[b]y accepting the benefits and refusing to repudiate to the transaction with knowledge of the unauthorized act, the principal was found to have ratified the transaction.")

Here the facts are uncontested. Nextel ratified the fax advertising conducted on its behalf as it failed to repudiate the fax advertising and failed to end its dealer agreement with Can-Am months after it learned that Can Am had fax advertised on its behalf, and Nextel accepted any and all benefits which flowed from the fax advertising. Can Am's owner, Robert Walsh, swears he was "aware of Nextel's [so-called] policy against fax advertising" [Nextel Ex. D, ¶ 5], in 1999 and 2000 Mr. Walsh signed at least 3 ABF contracts to send out at least 178,000 Nextel fax ads [Mot. for Cert. Ex. 19], Mr. Coontz and Mr. Belew both received one [Exs. S & U] and what did Nextel do about? Nothing. As of January 2002, Mr. Walsh swears he remains an authorized dealer, and advertiser, of Nextel products and services. Nextel Ex. D, ¶ 2.

Accordingly, Nextel not only retained the benefits of the Can Am fax advertising after acquiring full knowledge of it, Nextel brazenly admits to this Court that no matter what its authorized dealers do by way of fax advertising, as long as Nextel makes money off it, they will remain a Nextel authorized dealer. Nextel, is therefore, alternatively, liable as a result of its ratification of the fax advertising on its behalf.

B. Independent contractor status, even if true, is irrelevant.

There is only one published case in the nation on Nextel's so-called independent contractor defense. *Hooters v. Nicholson,* 537 S.E. 2d 468 (Ga. App. 2001), *cert. denied, en banc* (Ga. 2001). The Court eviscerates this entire premise of the Nextel motion for it concludes that even if Nextel prevails in the independent contractor assertion that claim is irrelevant to their liability under the TCPA

The *Nicholson* Court determined that liability does NOT hinge on a determination of whether the sender was an independent contractor or agent. *Id.* The Nicholson Court could not have been clearer:

> To provide some guidance to the trial court, we note that ***even if the jury finds that Clark [the sender] was an independent contractor, Hooters may still be liable for unsolicited facsimile advertisements.*** Under the **TCPA,** "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the [TCPA's] rule banning unsolicited facsimile advertisements." Release No. 95-310 of the Federal Communications Commission, CC Docket No. 92-90, 10 FCC Rcd 12391 (1995), ¶¶ 34-35. ***Based on this authority, we conclude that an advertiser may not avoid liability under the TCPA solely on the basis that the transmission was executed by an independent contractor.***

Id. at 367 (cm. added)

Importantly, the Nicholson Court held that even if the fact issue of agent versus independent contractor was resolved in favor of the advertiser, the Court concluded "that an advertiser may not avoid liability under the TCPA solely on the basis that the transmission was executed by an independent contractor." *Id.*

C. Federal law controls the analysis *at* hand and "state law does not operate of its own force".

> Since we proceed on the premise of the cxistcnce of a federal cause of action, it is clear that our decision is not controlled by *Erie R.* Co. *v. Tomkins*, 304 U.S. 64 ... and state law does not operate of its own force.
>
> . . .
>
> Legal rules which impact significantly upon the effectuation of federal rights, must, therefore, be treated as raising federal questions.

Burks v. *Lasker*, 441 U.S. 471, 476-77 (1979).

> It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denicd, by state statutes or state common law rules.

Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176 (1942).

> the [federal statute] allows state courts to entertain *in personam* maritime causes of action, **but** in such cases the extent to which state law may be used to remedy maritime injuries is constrained by the so-called "reverse-Erie" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.

Offshore Logistics, Inc. ***v.*** *Tallentire*, 477 U.S. 207, 222-23 (1986).

The fact that state statutes and common law cannot supercede or amend the defenses set forth in the federal **TCPA** is perfectly consistent with the fact that "[t]he numerous defenses available in comnion law causes of action have no place in **DTPA** claims"" or Texas Securities Act claims.[12]

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[11] *Hedley Feedlot, Inc. v. Weatherly Trust, 855* S.W.2d 826, 837 (Tex.App.--Amarillo 1993. writ denied); Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980)(DTPA relieves consumers of common law defenses and burdens of proof); accord, ***Kuehnhoefer v. Welch,*** 893 S.W.2d 689,692 (Tex.App.-Texarkana 1995, writ denied)(estoppel nor a defense to a DTPA action); ***Shenandoah Assoc. v. J & K Prop.,*** *Inc.*, 141 S.W.2d 470,496 (Tex.App.- Dallas 1987, writ denied)(on rehearing)(waiver and ratification are not defenses to DTPA claim as such claims are "not subject to common law defenses"); ***Watkins v. Hammerman & Gainer,*** 814 S.W.2d 867, 870 (Tex.Civ.App. - Austin 1981, no writ)

[12] ***Ins. Co. of North America v. Morns,*** 928 S.W.2d 133, 154 (Tex.App.- Houston [14th Dist.] 1996, writ granted), *aff'd in part, rev'd in part on other grounds. Ins. Co. of North America v. Morris,* 981 S.W.2d 661 (Tex. 1998)("common law defenses of estoppel and ratification are not available in DTPA or Texas Securities Act

However, eveii if state law could somehow "reverse preempt'' federal law or the "controlling weight" which must be afforded the FCC interpretation of same in this instance, a proposition which has been specifically rejected under the TCPA by a Texas federal court, *State of Texas v.* ***American*** *Blast Fax, Inc.*, 121 F.Supp. 2d 1085 (W.D.Tex. 2000), Nextel's so-called independent contractor defense still fails. This is because, assuming *arguendo* (while denying) that ABF was not Nextel's agent and just their "independent contractor" for purposes of advertising on their behalf – Nextel is still liable for their **TCPA** violations.

VII. CONCLUSION

Nextel's motion for summary judgment should be denied and Plaintiffs respectfully submit that it can not be granted.

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actions"), *Mayfield v. Troutman*, 613 S.W.2d 339. 344 (Tex.Civ.App.-Tyler 1981, writ ref'd n.r.e.)(contract in violation *of* Texas Securities **Act** not subject ***to*** ratification defense).

Respectfully submitted,

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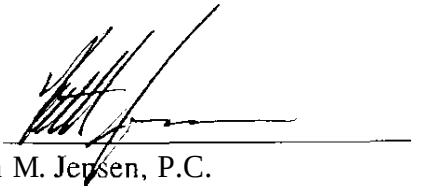

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the above and foregoing document in accordance with the Texas Rules of Civil Procedure on the below-listed counsel by the means listed below on this the 10th day of April, 2002.

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